MUNICIPAL CORPORATIONS—TITLE TO EARTH AND GRAVEL EXCAVATED IN STREET.—In the case of *Haas* v. *City of Evansville* (Ind.), 50 N. E. 47, it is held that where, in grading its streets, a city excavates earth, gravel, or other material from the street, such material belongs to the abutting proprietor, owner of the fee, but subject to the right of the city to use it in improving other streets under the same general plan of improvement. The converse of this ruling is, that the city has no right to take material from one street solely for the purpose of improving another steet; and though excavated to improve the street from which it is taken, such material cannot be used in the improvement of other streets save under the same general plan of improvement.

"Conceding, without deciding," says the court, "that the title to the material in question was in appellant, the question presented is, what right or title, as against the city, has an abutting property owner on a public street in a city to surplus earth and gravel and other materials excavated from the street in front of such property for the purpose of improving such street? It is well settled that, the other conditions being the same, the rule of law applicable to the taking of material solely to obtain material to be used elsewhere, and not for the purpose of grading or improving the place from which it is taken, is not applicable to cases where the material is taken for the express purpose of grading or improving the street at that point. The case of *Anderson* v. *Bement*, 13 Ind. App. 248, 41 N. E. 547, cited by appellant's counsel, was an action against a road supervisor for wrongfully digging up and carrying away earth and gravel from within the limits of a highway. It was held the action would lie; but it did not appear that the earth and gravel were removed for the purpose of improving the highway at the place from whence they were taken; and the court expressly holds that the question presented in that case is not whether the supervisor had the right to improve one part of the highway by removing earth and gravel therefrom and depositing such material for the improvement of the highway at another point. In *Turner* v. *Turnpike Co.*, 71 Ind. 547, cited by appellant's counsel, it is held that a road supervisor has no right to open a gravel pit in a highway, and remove gravel therefrom, to be used on other parts of the highway, and that a turnpike company which has appropriated the highway cannot remove earth and gravel without compensation first made, or assessed and tendered. But in that case the earth and gravel were not removed for the purpose of improving the road at that point. In *City of Delphi* v. *Evans*, 36 Ind. 90 (10 Am. Rep. 12), it was held that the common council of the city had no power to remove earth and gravel from one street for the purpose of filling up another street which had been ordered improved, where the removal of the earth and gravel was not for the purpose of improving the street from whence removed.

"It will be seen that in each of the above cases complaint was made because of the removal of earth from a place, not itself being improved, but for the purpose of getting earth to make some other improvement, and this fact clearly distinguishes these cases from the case at bar. The same is true of many of the cases of other courts cited by counsel. Although the fee of a street and a public highway may be in the adjoining lot owner, and, as a general proposition, he retains absolute control, subject only to the public easement, yet the uses to which a street in a city may be put are greater than with respect to ordinary highways in the country. In populous cities the easement is necessarily something more than a

mere right of passage. The abutting owner is still the owner of the soil, and retains his exclusive right to all mines, quarries, and the like, not inconsistent with the public use, and this use in a city extends to the right to construct sewers, lay water and gas mains, and the like. The city has the right to do all acts necessary to the beneficial use of the street by the public. 1 Dill. Mun. Corp. (3d ed.), sec. 688. In some jurisdictions it is held that a city, in improving a street, may take the natural material found within its limits, and use it in making such other improvements as the authorities deem best. *Bissell* v. *Collins*, 28 Mich. 277; *Viliski* v. *City of Minneapolis*, 40 Min. 304, 41 N. W. 1050; *Huston* v. *City of Ft. Atkinson*, 56 Wis. 350, 14 N. W. 444; *City of New Haven* v. *Sargent*, 38 Conn. 50; 9 Am. Rep. 360. See 2 Dill. Mun. Corp. (3d ed.), sec. 687, and notes.

"But in this State the rule is declared to be that the city can remove the natural soil from one street to another only when the improvement of the two streets is embraced in one and the same general plan of improvement. In *City of Aurora* v. *Fox*, 78 Ind. 1, suit was brought for the wrongful carrying away of the soil of the street. It appeared from the complaint that the city, without having adopted any general plan for the improvement of the streets, and without having advertised for proposals, and without having entered into a written contract, proceeded to dig up and haul away and appropriate the soil of the street. An instruction was requested to the effect that if it appeared the city had established the grade of the street in question, and that the common council had caused the earth to be removed from the street, and had graded the same according to the plan of the improvement of the street; that the work was done carefully and skillfully, doing no unnecessary injury to the abutting owner; that the owner's lot was not interfered with; and that there was no malice or ill will towards the lot-owner in adopting the plan and in making the improvement—the city was not liable. It was held that the instruction was erroneous in not correctly stating the law on the question of the right of the city to remove the soil from the street being improved, the court saying: 'The city had no right to remove the soil unless it was necessary for the improvement of the street, nor had it any right to use the earth taken from the street for any other purpose than that of grading streets forming part of the same general plan of improvement.' In another part of the opinion it is said: 'Where there is a general plan for the gradation and improvement of highways, intersecting streets and highways in the vicinity of the one improved are to be deemed parts of the same general plan, and soil may be removed from one and placed upon another. . . . . Where the soil is removed from one street to another, it should be shown that the improvement of the two streets was embraced in and formed part of one and the same general plan.'

"There is good reason for the limitation expressed in the rule as declared in the above case. It is well illustrated in the case at bar. By the terms of the contract and specifications the price paid the contractor included the cost of excavating and removing this material from the streets to such places as appellee designated. This cost is assessed against the abutting owner. But the abutting owner is to pay his proportionate part of the whole cost of a certain improvement, and not this cost together with the cost of hauling this material to some remote place in the city for the purpose of improving some other street not contemplated in the same general plan. The basis of the assessment is the supposed benefits to the abutting property by reason of the particular improvement. If the city had the right to

use this material as it did use it, it had the right to sell it or to give it to the contractor as a part of his compensation. When the earth and gravel were dug up, and were no longer used for street purposes, they became the property of the abutting owner, subject only to the right of the city to use them in improving other streets under the same general plan of improvement.

"When the abutting owner surrenders such rights as the public easement requires, it may be said that he impliedly agrees to surrender his right to the soil should the municipality need it in repairing or improving that particular way or system of which that is a part, and which the law presumes enhances the value of his property. But this is carrying the rule to its limit, and it will not do to say that he impliedly agreed that his property might be taken by the municipality to enhance the value of the property of some one else. The city could not, as of right, take the material and use it for the purposes it did use it. So that, unless it acquired this right in some way at some stage of the proceedings, the right did not exist, and such taking was wrongful, and a right of action accrued to the injured party."

The cases on this subject are not altogether harmonious. See *Sadler's Case*, 104 N. Y. 229; *Smith* v. *Rome*, 19 Ga. 89; *Bissell* v. *Collins* (Mich.), 15 Am. Rep. 217; *Lawrence* v. *Nahant*, 136 Mass. 477.

NEGLIGENCE—FIRE SET BY LOCOMOTIVE—PROXIMATE CAUSE.—A question of some novelty is presented in the recent case of *Cook* v. *Minneapolis etc. R. Co.*, 74 N. W. 561, decided by the Supreme Court of Wisconsin. The action was against a railroad company to recover damages for the destruction of the plaintiff's property, alleged to have been caused by fire negligently set from the defendant's locomotive. The proof was that a fire was negligently caused on or near the right of way by the defendant's locomotive, and that such fire gradually extended until it reached and destroyed the plaintiff's property. But it was further proved, and the jury found as a fact, that before the fire set by the railroad company reached the property of the plaintiff, which was several miles from the point where the fire begun, another fire, of unknown origin, coming from a different direction, united with it, and by force of a heavy gale prevailing the united fires swept over the plaintiff's property, destroying fences, barns and dwelling. The jury also found, and this is the chief source of difficulty in the case, that either of the fires would have caused the plaintiff's loss, without the assistance of the other, and at the same time and to the same extent. In other words, the fire of unknown origin would have destroyed the property, at the very time it was destroyed, even had the railroad company not set any fire at all; and, on the other hand, the fire set by the defendant company would still have wrought the same damage, and at the same time, had the fire of unknown origin not united with it. The question presented was whether the negligence of the railroad company was the proximate cause of the loss.

It is well settled that where the wrongful act of two wrongdoers concurs in producing an injury to a third person, either or both may be held liable for the entire damage. But here there was no proof of concurrent negligence, since the source of one of the fires was not ascertained. The court held, in a learned opinion, that under the circumstances it could not be said with reasonable certainty that the